BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SMITH STEELWORKERS, D.A.L.U. 19806, AFL-CIO

and

TOWER AUTOMOTIVE

Case 1
No. 55297
A-5593

(John Donald Termination)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Marianne Goldstein Robbins**, 1555 North Rivercenter Drive, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Varnum, Riddering, Schmidt & Howlett, LLP, by **Attorney Richard A. Hooker**, 350 East Michigan Avenue, Suite 500, Kalamazoo, Michigan 49007, appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, Smith Steelworkers, Directly Affiliated Local Union No. 19806, AFL-CIO (hereinafter referred to as the Union) and Tower Automotive Products Company (formerly the A.O. Smith Automotive Products Company, hereinafter referred to as the Employer or the Company) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as chair of a Board of Arbitration to hear and decide a dispute concerning the Company's decision to terminate employe John Donald in November of 1995. A hearing was held on November 21, 1997, in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. A stenographic record was made of the hearing, and the transcript was received November 28th. The parties submitted written arguments and the record was closed on December 28, 1997.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Board of Arbitration makes the following Award.

ISSUE

The parties stipulated that the issue before the Board of Arbitration was whether there was just cause for discharge and, if not, what is the appropriate remedy.

PERTINENT CONTRACT LANGUAGE

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Article VII - SENIORITY

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B. Loss of Seniority

An employee shall cease to have seniority under the following conditions:

1. If he quits or is discharged for just cause.

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BACKGROUND FACTS

The Company manufactures truck frames and related components in Milwaukee, Wisconsin. The Union is the exclusive bargaining representative for 2,100 of the Company's employes. The grievant John Donald was, at the time of his discharge in November of 1995, working in the Producer/Die Setter/Heavy Press classification in the Union's bargaining unit. He had been employed by the Company for 21 years.

The grievant was discharged for violating the Company's Attendance Control Program ("Program"). The Program, a no-fault system, was initiated in July of 1988, in response to what the Company felt was an unacceptably high absenteeism rate. Under the policy, employes are charged for a certain number of occurrences, depending upon the nature of an attendance-related infraction. One occurrence is charged for each day of absence. Each tardiness of three hours or less is charged as one-half occurrence. A tardiness of more than

three hours is counted as one occurrence. Each early quit is one-half occurrence. Occurrences are tallied on a calendar year basis, with the employe's record being reset to zero on January 1st if he had four or fewer occurrences in the preceding year. If he has more than four, his record is reset to four at the beginning of the new year. Employes receive a one occurrence reduction for each 120 calendar day period of perfect attendance after an oral warning.

Employes are counseled by their supervisors for every occurrence, and discipline is imposed at varying levels for the accumulation of occurrences:

Two: Counseling by supervisor
Four: Oral reminder by supervisor
Six: Written reminder from a Manager
Eight: A hearing and a one day "Decision Making Leave" 1/
Nine: Termination

1/ Employes are limited to one decision making leave per year. Thereafter an employe who reduces his points and then reaches 8 occurrences again is given a hearing and a job jeopardy warning.

Although the no-fault policy was extensively discussed with the Union in 1988, it was ultimately issued as a unilateral Company policy. There was considerable publicity about it throughout the plant, and the Union did agree to establish a joint committee to discuss exceptional circumstances.

The policy provides exceptions to the definition of an absence and an early quit, including some protection when an employe is sent home by the nurse. This aspect of the no-fault policy was amended in 1989, and a memo reminding employes of the amendment was posted in the plant in late September:

ATTENDANCE CONTROL REMINDER

"SENT HOME BY NURSE"

WHEN AN EMPLOYEE IS BARRED FROM CONTINUING TO WORK FOR MEDICAL REASONS, SUCH EARLY QUIT WILL NOT BE CHARGED UNDER THE ATTENDANCE CONTROL PROGRAM WHEN ALL OF THE FOLLOWING CONDITIONS ARE MET:

A) IT IS DETERMINED BY A MEDICAL PROFESSIONAL ON THE COMPANY STAFF THAT THE EMPLOYEE IS MEDICALLY UNABLE TO CONTINUE WORKING WITHOUT UNDUE RISK OF INJURY TO HIMSELF OR OTHERS ON THE JOB. IF THE MEDICAL FACILITY IS NOT OPEN, THEN THE EMPLOYEE'S IMMEDIATE SUPERVISOR MUST MAKE THE "SEND HOME" DECISION.

B) SUCH EXCEPTION SHALL BE LIMITED TO THE FIRST INCIDENT OF MEDICAL CONDITION IN ANY CONTINUOUS FIVE (5) WORK DAY PERIOD.

C) THIS DOES NOT EXTEND TO SELF-INFLICTED CONDITIONS RESULTING IN AN INABILITY TO WORK, SUCH AS APPARENT INTOXICATION OR DRUG USAGE.

IF AN EMPLOYEE IS ABSENT FOR ANY REASON, INCLUDING THE MEDICAL CONDITION FOR WHICH THE EMPLOYEE WAS SENT HOME, ON THE DAY FOLLOWING BEING SENT HOME, THE EMPLOYEE WILL BE CHARGED AN OCCURRENCE IN THE USUAL MANNER AS OUTLINED IN THE ATTENDANCE CONTROL PROCEDURE.

IMPORTANT: THE 'SENT HOME BY NURSE' POLICY IS RESTRICTED TO EMPLOYEES WHO HAVE BEEN ACTIVELY AT WORK ON THE JOB, ON THE DAY THE EMPLOYEE IS SEEN BY MEDICAL. IF AN EMPLOYEE COMES INTO THE PLANT ONLY TO BE EXAMINED BY MEDICAL, WITHOUT GOING TO WORK, A FULL OCCURRENCE WILL BE CHARGED IF THE EMPLOYEE DOES NOT WORK.

. . .

SEPTEMBER 28, 1989 JOSEPH FILAPEK JR.
ADMINISTRATOR
ATTENDANCE CONTROL

The Company's medical department is not open on the third shift after midnight or on some weekends. There is an unwritten understanding that when the nurse has left for the day, an employe should see the plant guard rather than the nurse if he wants to go home sick.

The grievant accumulated 8.0 points and a decision making day in 1989. He was laid off continuously from December of 1989 through August of 1993. After he returned, he

accumulated 8.5 occurrences by May of 1994, and was assessed a decision making day. In November, he again reached 8.5 occurrences, and was notified that his job was in jeopardy should he again be absent.

He was put back to 4 points in January of 1995. On April 21st, he received a decision making day for reaching 8.5 points, and in late September, he received another job jeopardy warning, based upon having twice reached 8.5 points during the year. He met with Philip Jurgens, the administrator of the attendance program, and was told that another tardy, early quit or absence would lead to his termination. No grievances were filed contesting the warning or the calculation that he was at 8.5 points.

On November 20, 1995, the grievant punched in at 10:25 p.m. for his 11:00 p.m. shift. Before the shift actually began, he felt ill and went to his locker for cold tablets. He had none, and decided to walk five blocks to his home to take some. He left the plant, but did not punch out. When he got home, he took the medication, and sat down. He fell asleep and did not wake up until after one o'clock in the morning. He returned to the plant, arriving between 1:30 and 1:45 a.m. He went to his locker, then went outside the plant and sat down for awhile. At 2:49 a.m., he went to the guard station, and told the guard he was ill with cold and flu symptoms. The guard observed that the grievant seemed congested and had a runny nose. He made a notation in the log reflecting the grievant's complaints, and the grievant went home.

The grievant was initially noted as having quit early, based on the time he punched out. The next day, Supervisor Calvin Comparin spoke with the grievant in the presence of his Union Steward, Tim McMurtry. Comparin asked the grievant if he had come to work the preceding day, and the grievant told him that he had been there and had punched in. In response to further questions by Comparin, the grievant said that he had walked through his work area but had then gone outside the gate and talked with some people from another department. He said he then went home and went to sleep until he awoke, realized what time it was, and returned to the plant at 1:45 a.m. The grievant told Comparin he went to his locker, then sat outside for awhile, and at 2:45 decided to go home because he was sick with a bad fever. Comparin asked him why he didn't go to the nurse if he was sick, and he said he didn't think to go to the nurse, because on third shift if you wanted to go home sick you waited until midnight and then went to see the guard. He said he had not seen a doctor for his illness and was not currently on any medication, though he had taken Company issued cold tablets the previous day. At the end of their interview Comparin asked the grievant and McMurtry whether they had anything they wished to add, and both said "no." He then read his notes back to them. The grievant said the notes were accurate and that he had nothing he wanted added or changed.

Based upon Comparin's investigation, the Company determined that the grievant had not performed any actual work during the shift, which would mean that his departure from work was not excused for having been sent home by the guard. The attendance records were

amended to show an early quit. This resulted in him being assessed half a point under the attendance program, and put him at 9.0 occurrences, which is over the limit. Subsequently the Company determined that his failure to perform any work would qualify this as an absence, rather than an early quit, and the records were amended to show a full occurrence and 9.5 points. He was discharged on November 29, 1995, for having a 9th occurrence in one year. The instant grievance was filed and was referred to arbitration.

A hearing was held on November 21, 1997, in Milwaukee, at which time, in addition to the facts recited above, the following testimony was taken:

John Donald

The grievant, John Donald, testified that he reported for work on the 20th at 10:35 p.m. and went to his locker to change clothes. At 10:45 he went to his press area and observed that the press was not ready for its run. He went outside for about ten minutes, but was not feeling well so he went back to his locker to get some cold tablets. He found that he didn't have any, so he decided to go home and get some. He lived about five blocks from the plant and thought he had time to get the tablets and get back. When he got home, he took the tablets and sat down. He had found that if he did not sit after taking the tablets, they would come back up. As he sat, he dozed off and did not wake up until 1:15 or 1:20 a.m. He returned to work and arrived between 1:30 and 1:45 a.m. He still felt ill, and he sat by his locker for a time. Then he walked down to the repair line, which is generally quiet, and sat there for a time. He continued to feel ill, and went to the guard house. He told the guard he felt ill, and that he had a fever and runny nose from a cold or the flu. The guard asked if the grievant wanted him to call his supervisor for him, and the grievant said "yes." The guard let him go home.

The grievant said he was at all times prepared to work, and that he didn't think the trip home for medicine would impede production, since the press wasn't ready to go. He was very surprised to be assessed a point, since he had the permission of the guard to go home.

On cross-examination the grievant explained that he did not go to the nurse for a cold pill because she sometimes refused to give out more than one, which was not enough to see him through the shift. He did not think he was too sick to work when he initially left the plant, so he did not ask the nurse to check him over while she was still on duty.

Tim McMurtry

Tim McMurtry testified that he has been a Steward for twenty-two years, and that he represented the grievant. He confirmed the grievant's testimony that the nurse frequently limited the amount of cold tablets she would dispense to two packets, which is not enough to

last for the shift. He noted that many employes did not understand the policy on being sent home by the nurse, and that the Company and the Union had agreed that simply posting a policy was not an effective way of communicating with employes.

McMurtry testified that employes are trained to prepare for production runs by looking at the work area and determining the status of the job. From the grievant's description of what he saw, the press was not ready for production on the 20th. Time records for that shift showed that an hour and a half was spent at the beginning of the shift preparing the paperwork and the press, before any production.

McMurtry said that what the grievant did was most accurately described as leaving his work area, and that in his experience this offense would usually lead to write up, a charge of violating work rules, and the assessment of an occurrence under the attendance control program.

William Krueger

William Krueger testified that he is the Grievance Chair for the Union. He reviewed the grievant's attendance and discipline records and noted three unexcused absences over a 14 year period. He found one formal act of discipline, a written warning for being out of his work area in 1986.

Krueger said that the grievant was guilty of violating Rule 14 on November 20th:

> Leaving work area or plant without permission during working hours, entering plant without permission outside of regularly scheduled work hours.

Krueger researched prior Rule 14 violations, and found five cases in which employes had multiple violations of Rule 14, including one instance in which an employe was found in a tavern during his shift, and in all of these cases the employes received suspensions from the Company.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Arguments of the Company

The Company takes the position that the grievant was discharged for just cause. This is a simple case. The modified no-fault attendance policy was properly implemented, and has consistently been sustained by arbitrators. The "sent home by nurse" aspect of the policy was posted, was available to the grievant if he cared to familiarize himself with it, and was known

to the Union. The exception for employes sent home by the nurse does not apply to employes who have not been "actively" at work. While he did stop at the plant twice on the evening of November 20th, the grievant performed no actual work, and thus did not qualify for the exception. The grievant had 8.5 occurrences before November 20th, and he was properly assessed another occurrence for his absence on that date. By reaching 9 occurrences, after having been given four final warnings in the preceding 18 months, he plainly merited discharge under the clear terms of the policy.

The Union's argument that the grievant should have been disciplined under the work rules for leaving his work area instead of being assessed an occurrence under the attendance control policy has no merit. The work rules operate independently from the attendance control policy. The Company would have been justified in imposing discipline under the work rules in addition to the discharge under the attendance control policy, but it was not obligated to elect one course over the other. Union Steward McMurtry admitted as much in his testimony, when he said that the Company customarily responded to an employe leaving his work area by imposing discipline under the rules, and/or by assessing an occurrence. Here the Company elected not to proceed under the work rules. This was sensible, since the grievant was being discharged under the attendance control policy and additional discipline was unnecessary. More to the point, it was completely within the Company's discretion to make this election.

Although they are ultimately irrelevant, the Company urges the Arbitration Board to reject the grievant's claims of illness. The Company points out that the nurse was at the plant when the grievant first left, and that if he was really in need of cold tablets he could have gotten them from her. When he was asked the next day why he didn't see the nurse, his only explanation was that third shift employes who wanted to leave sick always waited until after midnight when the nurse was gone and then saw the guard. The Company also notes that the grievant, who was so grievously ill on the 20th, told his supervisor the following day that he was no longer taking any medication. His testimony at the arbitration hearing added significant details of his activities on the night of the 20th beyond those he was able to recall the very next day when he was interviewed by the Company. Taken as a whole, the grievant's story makes no sense and should be discredited.

Finally, the Company argues that the Arbitration Board must reject the grievant's effort to use his length of service to mitigate his offense. He has consistently been on the verge of discharge for attendance related problems since his return from layoff, and has received ample warnings and second chances. The Arbitration Board should not undermine the attendance control policy for the benefit of an employe whose history demonstrates that he is not interested in being at work. For all of these reasons the Company asks that the Board uphold the discharge and deny the grievance.

The Arguments of the Union

The Union argues that the grievant was not properly discharged under the Company's own policies and practices, and must be reinstated. There are four major defects in the Company's case:

1. The Company failed to prove that the grievant's conduct even constitutes an occurrence under its attendance control policy;

2. The Company failed to give the grievant adequate notice that he could be assessed an occurrence despite having the guard's permission to go home;

3. The Company failed to apply its rules consistently and even-handedly, in that similarly situated employes have been disciplined under the work rules rather than being assessed an occurrence under the attendance control policy;

4. The Company's decision to use discharge as a penalty was not reasonably related to the seriousness of the grievant's conduct, particularly in light of his length of service.

The Company bears the burden of proving a rule violation, and it has failed to do so. In order to prevail, the Company must prove that the grievant was eligible for an occurrence under its policy. In fact, he was actively at work before he left the plant, having punched in, changed his clothes, and checked the status of the press. He could not begin production because the press was not available for an hour and a half into the shift due to maintenance. That is hardly his fault, and having begun the preparatory work he qualified as being actively at work. He was then sent home by the guard, because he was observably ill. When the nurse is not there, employes go to the guard to be sent home, and when they do so they are exempted from any assessments under the attendance policy. Thus it is clear that the grievant was not properly assessed an occurrence for the events of November 20th.

The grievant had no reason to suspect that he might be assessed an occurrence under the policy if he was not "actively at work" on a day when he was sick. This refinement of the original policy was posted for a very brief time in 1989, a year during which the grievant went on an extended layoff. After this brief posting, it was not effectively communicated to the work force in any way. As with any employe, the grievant cannot be expected to conform his behavior to a rule which is not known to him. Thus he cannot legitimately be disciplined.

Even if the grievant had committed some sort of offense, just cause requires that discipline be administered on a consistent basis across the work force. Here the evidence clearly shows that if the grievant did anything, it had nothing to do with tardiness or absenteeism. Instead, he left the premises while on the clock. The Company has a rule which is directly on point to this conduct, a rule that uniformly requires a suspension even for repeated violations. The Union presented proof of five cases in which employes left the

premises while on the clock, and were suspended. Three of these cases arose after the implementation of the no-fault attendance control policy. The Company can hardly discharge the grievant for his first offense under this rule when it has suspended the other employes who were guilty of violations.

Discipline, in order to be valid, must take into account the characteristics of the individual employe and his actual conduct. The Union argues that the Company's decision to discharge an employe with twenty-one years of service for leaving work when he was ill is so far out of proportion to the employe's record and actual conduct as to be indefensible. Taken in combination with the evidence showing that other similar conduct has resulted in nothing more than a brief suspension, this should cause the Board to reinstate the grievant to his job. For all of the reasons, the Union urges that the Board sustain the grievance.

DISCUSSION

There are four principal issues before the Arbitration Board:

1. Did the grievant have reasonable notice of the provisions of the "Sent Home by Nurse" policy? If so,

2. Did the grievant earn an occurrence under the attendance policy on November 20th? If so,

3. Did the Company engage in disparate or discriminatory treatment by proceeding under the attendance policy rather than the work rules? If not,

4. Is the penalty of discharge excessive under all of the circumstances?

Each of these issues is addressed in turn.

A. Did the Grievant Have Notice of the "Actively at Work" Provision of the Sent Home By Nurse Policy?

An employe cannot be legitimately disciplined for violating a rule that he did not know about or should not have known about. Initially, the question before the Arbitration Board is whether the grievant had notice that he could receive an occurrence even though the guard sent him home. This turns on whether he knew or should have known that the policy on being sent home required that he actively work at some point. The written policy is quite clear on this point:

IMPORTANT: THE 'SENT HOME BY NURSE' POLICY IS RESTRICTED TO EMPLOYEES WHO HAVE BEEN ACTIVELY AT WORK ON THE JOB, ON THE DAY THE EMPLOYEE IS SEEN BY MEDICAL. IF AN EMPLOYEE COMES INTO THE PLANT ONLY TO BE EXAMINED BY MEDICAL, WITHOUT GOING TO WORK, A FULL OCCURRENCE WILL BE CHARGED IF THE EMPLOYEE DOES NOT WORK.

The grievant testified that he wasn't sure he had ever seen this part of the policy. He may or may not have studied this detail when it was posted in 1989, but he was clearly familiar with other details of the policy, including the unwritten rule that third shift employes could get an excuse from the guard after the nurse left at midnight.

It may be true, as contended by the Union, that posting is not the most effective way of communicating with employes but it was the standard means for relaying information in 1989. Where the Company follows the commonly accepted method for announcing rule changes and there is no evidence of some specific problem with the posting of the particular rule at issue, the presumption is that the employe did have notice.

In addition to this general presumption, the Arbitration Board is persuaded that the grievant could not reasonably have believed that he could qualify for an exception from the attendance policy without actually performing any work. The no-fault policy focuses on whether an employe is on the job or not, generally without regard to the reason. The policy does not exempt most absences due to a one day illness, except for early quits where the nurse sends the worker home from work. Under this scheme, it would make no sense for the policy to allow employes to come to the plant, perform no work, see the nurse and go home without an occurrence.

For these reasons, the Arbitration Board concludes that the grievant had reasonable notice of the "actively at work" requirement, and either knew or should have known that he would be assessed an occurrence if he was sent home without performing any work.

B. Did the Grievant Earn an Occurrence Under the Attendance Policy?

The second question before the Arbitration Board is whether the grievant actually earned an occurrence by his actions on November 20th. He clocked in at 10:25 p.m. and was unaccounted for for just over four hours, until he clocked out at 2:49 a.m. Taking the grievant at his word, the chronology of his evening is:

10:25 Punches in

Changes clothes in locker room

10:35 Walks past his machine - observes its condition

Goes outside for ten minutes
Goes back to his locker
Leaves for home - does not clock out

11:00 Shift starts

Takes cold pill
Fall asleep

1:15 Wakes up

1:30 Returns to plant - does not clock in

Sits by locker
Sits by repair line

2:49 Punches out at guard house

The grievant told the guard that he was ill, and the guard confirmed that he had a runny nose and seemed congested. The guard is authorized to act in the nurse's stead when she is off duty and an employe needs to go home ill. Since the grievant was allowed to go home by the person authorized to make this judgment, the Arbitration Board finds that he met this requirement of the "Sent Home By Nurse" exception to the attendance policy. The real question is whether he met another prerequisite of the policy, that he must have been actively at work on the job before going home.

Tim McMurtry testified that employes are trained to observe the condition of the machine and check the availability of raw materials and such before starting work. Thus the Union claims that by walking past the machine at 10:35 or 10:45 2/, and observing that it was not ready for production, he was "actively at work on the job." With all due respect to the Union's assertion, the Board believes that there is a difference between casually looking at a machine in passing, and doing work preparatory to production. By his own account, the grievant walked past his machine on his way outside. He did not check the production schedule, the status of materials or what work needed to be done on the press before work could begin. He did not speak to anyone about the night's work. If he was "actively at work on the job" simply by looking at his machine, it can equally be said that he commenced work by clocking in or by changing clothes.

2/ The grievant testified that this happened at 10:45, but he did so right after he testified that he clocked in at 10:35. In fact, he clocked in at 10:25, and the reasonable inference is that he walked past the machine ten minutes after arriving.

Without purporting to precisely define what is required to be "actively at work on the job" the Arbitration Board finds that the reasonable interpretation of this portion of the rules requires something more than simply glancing at the machine 25 minutes before the shift begins. Thus the grievant did not meet the requirements of the "Sent Home By Nurse" exception to the attendance policy. 3/

3/ Even if his leaving at 2:49 a.m. was not grounds for action under the attendance policy, the Board notes that the grievant, by his own account, left the plant before the start of his shift, and did not return to work until at least two and a half hours into the shift. Granting that he had clocked in, he left shortly thereafter and was not actually at the plant for the first third of his shift. Arriving two and a half hours into the shift would generally be considered tardiness, a half point occurrence under the policy. Given the finding that he was not excused for the overall shift, it is not necessary to draw any firm conclusions as to his possible tardiness.

C. Did the Company Engage in Disparate or Discriminatory Treatment By Charging the Grievant Under the Attendance Policy Rather Than Under Rule 14?

William Krueger testified that the grievant was guilty of leaving his work area, rather than any attendance infraction, and should have been subjected to progressive discipline under Company Rule 14 rather than discharge under the attendance policy:

> Leaving work area or plant without permission during working hours, entering plant without permission outside of regularly scheduled work hours.

Krueger pointed to five other cases involving suspensions under Rule 14, three of which occurred after the no-fault attendance policy was put in place. The Board agrees that the Company cannot pick and choose among employes who engage in the same conduct, charging some under Work Rules and others under the attendance policy, playing off the policies to manipulate the choice of penalty. Having made this observation, the Board finds that there is no evidence that the Company did this.

At the outset, the Board notes that the grievant did not leave the plant without permission during work hours, and thus did not technically violate Rule 14. The grievant's version of his movements has him leaving the plant before the start of the shift, which he had a perfect right to do under Rule 14. More to the point, the grievant's conduct was actionable under the attendance policy. Even assuming that he did violate Rule 14, it would have made little sense to charge him with violating plant work rules when he was already being discharged under the other policy.

The Union's central complaint is that other employes have been charged with similar conduct and have not been discharged. The other five cases involve penalties under Rule 14. The grievant was not charged with violating Rule 14. He was charged with accumulating 9 occurrences in a single year under the attendance control policy, a charge that the Board has concluded is meritorious. The Company is not required to suspend the operation of its attendance program when an employe's violation of that policy also arguably violates plant rules. If disparate treatment has occurred, it must be because these other employes were not disciplined under the attendance control policy. There is no evidence to support this notion. Two of the Rule 14 violations cited by the Union took place before the current attendance policy was in place. The record does not show the status of the other three employes under the attendance policy, nor does it show whether they were assessed for an occurrence under that policy for their Rule 14 violations. Discharge is the last step of the attendance control policy, and the mere fact that these three employes were not discharged says nothing about their treatment under the policy. 4/

4/ The Board notes Steward Tim McMurtry's testimony to the effect that leaving the plant will usually result in discipline under the plant rules and an occurrence under the attendance policy. Assuming that this was a Rule 14 violation, McMurtry's testimony suggests that, rather than being discriminated against, the grievant may have been afforded better treatment than other employes.

A finding of disparate treatment requires not only that employes engage in similar conduct, but that overall the employes be similarly situated. Just as a progressive discipline system will yield different penalties for the same offense, depending upon the employes' prior records, an attendance related infraction will yield different penalties. Thus it is inevitable that there will be variations in the penalties assessed for all but the most serious infractions.

The final aspect of the Union's disparate treatment argument is that the suspension of other employes for leaving the plant may have led the grievant to think he would not be fired for this. Again, the grievant was discharged for his attendance record. He was counseled four times in the eighteen months before his discharge about the results of another occurrence

while he was at eight or more for the year. Even assuming that he had some knowledge of these other cases, the Board cannot conclude that he was confused about the consequences of being involved with another attendance related infraction.

In summary on the merits of the case, the Arbitration Board finds that the grievant had adequate notice of the attendance policies, and knew or should have known that he had to have been actively working on the job in order to avoid an occurrence when the guard gave him permission to leave on November 20, 1995. He was not actively working on the job on the 20th, and did not qualify for the Sent Home By Nurse exemption. He was properly assessed an occurrence, thereby reaching the level of discharge under the schedule of penalties in the attendance policy. There was no discrimination or disparate treatment involved in the decision to discipline him under the attendance control policy rather than under the work rules, since there is evidence that other employes who have left the plant have been charged under both. Neither is there any evidence of disparate treatment demonstrated by the fact that other employes have not been fired for leaving the plant, since neither the plant rules nor the attendance policy require discharge as an automatic response to this offense, and the record is silent as to the other employes' status under the attendance policy.

D. Is the Penalty of Discharge Excessive Under All of the Circumstances, Given the Grievant's Work Record and Length of Service?

The most difficult issue before the Board is whether the grievant's length of service and work record sufficiently mitigate against a discharge. While the no-fault attendance system is styled as automatic and mechanical, it cannot obliterate the contract's requirement that there be just cause for discipline. Just cause requires consideration of mitigating and aggravating factors, and that the penalty fit the offense and the offender. Just as a record of poor service over a short time will work against an employe in assessing a penalty, a record of good service over a long time must weigh in his favor. This grievant has been employed at Tower and its predecessor, A.O. Smith, for twenty-one years. He has no noteworthy discipline outside of attendance related matters. Clearly this record cuts in favor of the grievant retaining his job. It must be noted, however, that long service does not render an employe invulnerable to discipline or exempt from the rules. In this case, giving the grievant full credit for his years of service, the Board nonetheless finds that the Company had just cause to discharge him. The Board bases this decision on the facts that the grievant's attendance record since returning from layoff demonstrates a consistent pattern of poor attendance, that he had been given a clear final warning four times in the year and a half preceding his final occurrence in November of 1995, and that his final offense was not a technical or minor violation of the rules.

The grievant was laid off from late 1989 to August of 1993. After his recall, he was counseled for an absence on October 8th, verbally warned for an absence on October 22nd, and given a written warning for being absent on November 11th.

In January of 1994, he reverted to four points. He was absent on January 6th. He was a no call - no show on January 13th. He missed work on January 20th and 21st. He was tardy on March 21st, and was a no call - no show on April 28th and 29th. This put him at 8.5 points, and he was assessed a decision making leave on May 17th. He had perfect attendance for 120 days after that, resulting in the restoration of a point on August 27th, then had an early quit on September 3rd. He was absent on October 28th and 29th, putting him at 8.5 occurrences. Since he had already had one paid decision making leave, he was given a warning that his job was in jeopardy and that he would be fired if he reached nine occurrences.

In January of 1995, he reverted to four points. He was tardy on January 9th, and absent on January 19th and 25th, and March 2nd. He was absent again on April 6th, which put him at 8.0 points and led to another decision making leave. He had 120 days of perfect attendance, and received a one-day credit on August 15th. He quit early on August 31st, which he said was for court appearance. He was assessed a half point, but was given the opportunity to demonstrate that the court proceeding was resolved in his favor and have the occurrence removed from his record. He was absent on September 21st and 22nd, putting him at 8.5 points and triggering another job jeopardy warning.

The grievant's record since returning from layoff is one of going to the edge of discharge, then either correcting his attendance just long enough to earn a one point credit, or just long enough to see him to the end of the year when point totals are automatically reduced. It is striking in his record that as soon as he gets breathing room from one of these events, his attendance worsens. This strongly suggests that he was well aware of how the system worked, and that he was fully capable of conforming his behavior to it.

As noted several times in this Award, the grievant was warned four times, in person and in writing, that reaching 9 occurrences in a calendar year would lead to termination. These warnings were all given in the year and a half before he was discharged. His perilous position in November of 1995 was not the result of an isolated string of bad luck. Nor, despite the Union's best arguments, can his absence on November 20th be considered a technicality or a minor violation. The grievant is not an innocent victim of circumstances. He came to the plant and then went missing for four hours. According to his story, he went back home and slept for most of this time, then returned to the plant and sat for an hour, without checking in with his supervisor or taking any other step to get his explanation for his whereabouts on the record. His conduct might plausibly be categorized as an absence, an early quit or a tardy. However it is labeled, it resulted in a 9th occurrence.

On the basis of the foregoing, and the record as a whole, the Arbitration Board has made the following

AWARD

The grievant was discharged for just cause. The grievance is denied.

Signed this 18th day of May, 1998 at Racine, Wisconsin.

Daniel Nielsen /s/
Daniel Nielsen, Neutral Chair
Board of Arbitration

I concur:

Karl Dahlen /s/
Date: 9/14/98 Karl Dahlen, Company Arbitrator

I concur:

Arthur Skowron /s/
Date: 9/10/98 Arthur Skowron, Company Arbitrator

I dissent:

Duane McConville /s/
Date: 8/21/98 Duane McConville, Union Arbitrator

I dissent:

John Paul Hartig /s/
Date: 8/21/98 John Paul Hartig, Union Arbitrator

Issued from Racine, Wisconsin, this 21st day of October, 1998.

DJN/mb
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